

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1A Implementation of the 2021 Gaming Compact between the Seminole Tribe of Florida and the State of Florida

SPONSOR(S): Select Subcommittee on the Seminole Gaming Compact; Payne and Garrison

TIED BILLS: CS/HB 7A, HB 3A **IDEN./SIM. BILLS:** CS/SB 2-A

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Select Subcommittee on the Seminole Gaming Compact	13 Y, 4 N, As CS	Thompson	Anstead
2) Select Committee on Gaming		Thompson	Hamon

SUMMARY ANALYSIS

The Seminole Tribe of Florida (Seminole Tribe) is a federally recognized Indian Tribe whose reservations and trust lands are located in the state. Florida entered into a gaming compact with the Seminole Tribe on April 7, 2010 (the 2010 Compact). Gaming compacts are regulated by the Federal Indian Gaming Regulatory Act, s. 25 U.S.C. 2701, et seq., and ch. 285, part II, F.S.

The bill ratifies and approves the Gaming Compact between the Seminole Tribe and the State of Florida (state), which was executed by Governor Ron DeSantis and the Seminole Tribe on April 23, 2021, as amended on May 17, 2021 (the 2021 Compact). If ratified, the 2021 Compact will supersede the 2010 Compact. The 2021 Compact has a term of 30 years.

The bill allows the Seminole Tribe to **continue to conduct** the following types of games that were previously authorized in s. 285.710, F.S.:

- Slot machines;
- Raffles and drawings; and
- Banked card games, including baccarat, chemin de fer, and blackjack (21).

In addition, the bill allows the Seminole Tribe to conduct the following **new games**:

- Craps, including dice games such as sic-bo and any similar variations;
- Roulette, including big six and any similar variations;
- Fantasy sports contests; and
- Sports betting (at casinos and on mobile devices).

The 2021 Compact provides the Seminole Tribe with partial, but significant exclusivity for certain gaming in Florida, in exchange for making guaranteed minimum payments to the state based on percentages of net win, ranging from 12 percent to 25 percent for the full term of the compact, and establishes a guarantee minimum revenue sharing payment after the first five years of the compact, to total \$2.5 billion.

The 2021 Compact authorizes the Seminole Tribe to stop or reduce revenue sharing payments if the state authorizes specified gaming in violation of the Seminole Tribe's exclusivity rights as set forth in the 2021 Compact.

The 2021 Compact specifically indicates that if designated player games, subject to certain limitations, are offered in the state, such activity will not violate the terms of the 2021 Compact.

The bill will have a significant positive fiscal impact to the state.

The effective date of the bill is contingent upon approval of the 2021 Compact by the United States Department of the Interior, and the date that notice of the effective date of the compact is published in the Federal Register.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

General Overview of Gaming in Florida

Gambling is generally prohibited in Florida, unless specifically authorized. Section 7, Art. X, of the Florida Constitution prohibits lotteries, other than pari-mutuel pools, from being conducted in Florida. Chapter 849, F.S., includes prohibitions against slot machines, keeping a gambling house and running a lottery. However, a constitutional amendment approved by voters in 1986 authorized state-operated lotteries.

The following gaming activities are also authorized by law and regulated by the state:

- Pari-mutuel¹ wagering at licensed greyhound and horse tracks and jai alai frontons;²
- Gaming on tribal reservations in accordance with the Indian Gaming and Regulatory Act and the 2010 Gaming Compact with the Seminole Tribe of Florida;
- Slot machine gaming at certain licensed pari-mutuel locations in Miami-Dade County and Broward County;³ and
- Cardrooms⁴ at certain pari-mutuel facilities.⁵

Chapter 849, F.S., also authorizes, under specific and limited conditions, the conduct of penny-ante games,⁶ bingo,⁷ charitable drawings,⁸ game promotions (sweepstakes),⁹ bowling tournaments,¹⁰ and skill-based amusement games and machines at specified locations.¹¹

In 2013, the legislature clarified that Internet café style gambling machines were illegal in the state. The legislation clarified existing sections of law regarding slot machines, charitable drawings, game promotions, and amusement machines and created a rebuttable presumption that machines used to simulate casino-style games in schemes involving consideration and prize are prohibited slot machines.¹²

In 2015, the legislature determined that the regulation of the operation of skill-based amusement games and machines would ensure compliance with Florida's limitations on gambling and prevent the expansion of casino-style gambling. The legislature clarified the operation and use of amusement games or machines to ensure that regulations would not be interpreted as creating an exception to the state's general prohibitions against gambling.¹³

¹ "Pari-mutuel" is defined in Florida law as "a system of betting on races or games in which the winners divide the total amount bet, after deducting management expenses and taxes, in proportion to the sums they have wagered individually and with regard to the odds assigned to particular outcomes. See s. 550.002(22), F.S.

² See ch. 550, F.S., relating to the regulation of pari-mutuel activities.

³ See FLA. CONST., art. X, s. 23, and ch. 551, F.S.

⁴ S. 849.086(2)(c), F.S., defines "cardroom" to mean "a facility where authorized card games are played for money or anything of value and to which the public is invited to participate in such games and charged a fee for participation by the operator of such facility."

⁵ The Department of Business and Professional Regulation (DBPR) has issued licenses to permitholders with 2021-2022 Operating Licenses to operate 27 cardrooms. See <http://www.myfloridalicense.com/DBPR/pari-mutuel-wagering/permitholder-operating-licenses-2021-2022/> (last visited Apr. 7, 2021).

⁶ S. 849.085, F.S.

⁷ S. 849.0931, F.S.

⁸ S. 849.0935, F.S.

⁹ S. 849.094, F.S., authorizes game promotions in connection with the sale of consumer products or services.

¹⁰ S. 849.141, F.S.

¹¹ S. 546.10, F.S.

¹² Florida House of Representatives Select Committee on Gaming, Final Bill Analysis of 2013 CS/HB 155, p. 1 (Apr. 19, 2013).

¹³ S. 546.10, F.S.

2010 Gaming Compact Between the Seminole Tribe and the State

The Seminole Tribe and the state executed the 2010 Compact on April 7, 2010, which was ratified through Chapter 285, F.S. The 2010 Compact took effect when published in the Federal Register on July 6, 2010.

The 2010 Compact provides for revenue sharing from the Seminole Tribe to the state and provides the Seminole Tribe with the exclusive authority to offer banked card games on tribal lands at five locations for five years and slot machine gaming outside Miami-Dade and Broward Counties until 2030.

The Seminole Tribe conducts gaming at the following locations in the state:

- Seminole Indian Casino – Brighton, Okeechobee, FL
- Seminole Indian Casino - Coconut Creek, FL
- Seminole Indian Casino - Hollywood, FL
- Seminole Indian Casino - Immokalee, FL
- Seminole Indian Casino - Big Cypress, Clewiston, FL
- Seminole Hard Rock Hotel & Casino - Hollywood, FL
- Seminole Hard Rock Hotel & Casino - Tampa, FL

In exchange for exclusivity, the Seminole Tribe agreed to pay the state a share of “net win” totaling approximately \$240 million per year. The 2010 Compact required the Seminole Tribe to share revenue with the state in the amount of \$1 billion over the first five years, and such payments were made to the state.

The 2010 Compact provides consequences for the expansion of gaming in the state:

- If new forms of Class III gaming and casino-style gaming are authorized for the eight licensed pari-mutuel facilities located in Miami-Dade and Broward counties (which may not relocate) and the net win from the Seminole Tribe’s Broward facilities drops for the year after the new gaming begins, then the Seminole Tribe may reduce the payments from its Broward facilities by 50 percent of the amount of the reduction in net win.
- If new forms of Class III gaming and other casino-style gaming are authorized for other locations in Miami-Dade and Broward counties, then the Seminole Tribe may exclude the net win from their Broward facilities from their net win calculations when the new games begin to be played.¹⁴

Revenue sharing payments cease if:

- The state authorizes new forms of Class III gaming or other casino-style gaming after February 1, 2010, or authorizes Class III gaming or other casino-style gaming at any location outside of Miami-Dade and Broward counties that was not authorized for such games before February 1, 2010; and
- The new gaming begins to be offered for private or public use.

Starting in July 2015, DBPR¹⁵ and the Seminole Tribe engaged in litigation over the conduct of “designated player” card games at pari-mutuel facilities. The Seminole Tribe alleged that such games were a breach of the 2010 Compact.

On November 9, 2016, a federal court ruled that the state had violated the terms of the Compact and the Seminole Tribe was entitled to continue offering banked card games beyond the initial 5-year blackjack authorization and continue offering such games for the entire 20-year term of the Compact (expiring July 2030). The Seminole Tribe continued to make full revenue sharing payments to the state

¹⁴ The Seminole Tribe would automatically be authorized to conduct the same games authorized for any other person at any location.

¹⁵ S. 285.710(1)(f), F.S., designates the Division within DBPR as the “state compliance agency” responsible for carrying out the state’s oversight responsibilities under the 2010 Compact.

throughout the course of the litigation. The parties did not raise, and consequently the ruling did not address, the future revenue sharing obligations of the Seminole Tribe.

The parties subsequently executed a settlement agreement in July 2017, which was extended in April 2018. Under the settlement agreement, the Seminole Tribe agreed to continue revenue sharing payments provided that DBPR “aggressively enforced” the statutory ban on banking card games.

In April 2019, the Seminole Tribe stopped revenue sharing payments to the state because the Seminole Tribe believed that aggressive enforcement had not occurred.

Section 285.710(9), F.S., provides that money received by the state from a gaming compact is to be deposited into the General Revenue Fund and provides for the distribution of three percent of the amount paid by the Seminole Tribe to specified local governments. As designated in s. 285.710, F.S., the Division of Pari-mutuel Wagering of the DBPR carries out the state’s oversight responsibilities under the 2010 Gaming Compact.

A new compact was signed by the Governor and the Seminole Tribe on April 23, 2021 (the 2021 Compact), but must be ratified by the Legislature and approved by the United States Secretary of the Interior to become effective.¹⁶ If the 2021 Compact is ratified and approved, it will provide the Seminole Tribe exclusivity to operate certain games, with certain exceptions.¹⁷ In exchange, the Seminole Tribe will share revenue with the state with a Guaranteed Minimum Compact Term Payment of \$2.5 billion over five years.

Indian Gaming and Regulatory Act (IGRA)

Gambling on Indian lands is subject to federal law, with limited state involvement. IGRA, codified at 25 USCA §§ 2701-2721, was enacted in 1988 in response to the United State Supreme Court decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). The act provides for “a system for joint regulation by tribes and the Federal Government of class II gaming on Indian lands and a system for compacts between tribes and states for regulation of class III gaming.”¹⁸ In so doing, IGRA seeks to balance the competing interests of two sovereigns: the interests of the Seminole Tribe in engaging in economic activities for the benefit of its members and the interest of the state in either prohibiting or regulating gaming activities within its borders.¹⁹

IGRA separates gaming activities into three categories:

- **Class I games** are “social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations.”²⁰ Class I games are within the exclusive jurisdiction of the Indian tribes.²¹
- **Class II games** are bingo and card games that are explicitly authorized or are not explicitly prohibited by the laws of the state.²² The tribes may offer Class II card games “only if such card games are played in conformity with those laws and regulations (if any) of the state regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.” Class II gaming does not include “any banking card games, including baccarat, chemin de fer, or blackjack (21), or electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.”²³ Class II games are also within the jurisdiction of the Indian tribes, but are also subject to the provisions of IGRA.²⁴

¹⁶ S. 285.710, F.S.

¹⁷ *2021 Gaming Compact Between the Seminole Tribe of Florida and the State of Florida*, pgs. 2&3 (Apr. 23, 2021).

¹⁸ United States Senate Report No. 100-446, Aug. 3, 1988.

¹⁹ *Id.*

²⁰ 25 U.S.C. 2703(6).

²¹ 25 U.S.C. 2710(a)(1).

²² 25 U.S.C. 2703(7)(A).

²³ 25 U.S.C. 2703(7)(B).

²⁴ 25 U.S.C. 2710(a)(2) and (b).

- **Class III games** are defined as any games that are not Class I or Class II. Class III games include slot machines and banked card games such as blackjack, baccarat and chemin de fer.²⁵

A tribe can qualify to offer Class III games in the following ways:

- If the state authorizes Class III games for any purpose to any person, organization, or entity, the tribe must:
 - Authorize the games by an ordinance or resolution adopted by the governing body of the Indian tribe, approved by the Chairman of the National Indian Gaming Commission, and in compliance with IGRA; and
 - Conduct the games in conformance with a tribal-state compact entered into between the tribe and the state.²⁶
- If the state does NOT authorize Class III gaming for any purpose by any person, organization, or entity, the tribe must request negotiations for a tribal-state compact governing gaming activities on tribal lands. Upon receiving such a request, the state may be obligated to negotiate with the Indian tribe in good faith.²⁷ Under IGRA, a tribe is not entitled to a compact.

Generally, in accordance with IGRA, **a compact may include** the following provisions:

- The application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of gaming;
- The allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of laws and regulations;
- An assessment in an amount necessary to defray the costs of regulation;
- Revenue sharing by the Indian tribe for permitted activities;
- Remedies for breach of contract;
- Standards for the operation of gaming and gaming facilities, including licensing; and
- Any other subjects that are directly related to the operation of gaming activities.²⁸

Any compact that is entered into by a tribe and a state will **take effect** when approval by the Secretary of the Interior is published in the Federal Register.²⁹ Upon receipt of a proposed compact, the Secretary has 45 days to approve or disapprove the compact.³⁰ A compact will be considered approved if the Secretary fails to act within the 45-day period. A compact that has not been validly “entered into” by a state and a tribe (e.g., execution of a compact by a state officer who lacks the authority to bind the state) cannot be put “into effect”, even if the Secretary of the Interior publishes the compact in the Federal Register.³¹

IGRA authorizes the Secretary to disapprove a compact if it violates IGRA, if it violates any other federal law, or if it violates the trust obligations of the United States to Indians. Sometimes, the Department declines to issue an approval because of concerns with a compact; however, it also declines to issue an affirmative disapproval. In those instances, the compact is approved by operation of law.

When the negotiations fail to produce a compact, a tribe may file suit against the state in federal court and seek a determination of whether the state negotiated in **good faith**. However, the state can claim sovereign immunity. If the state claims **sovereign immunity**, the case may be dismissed.³² If the state does not and the court finds the state negotiated in good faith, the tribe's proposal fails. On a finding of lack of good faith by the state, however, the court may order negotiation, followed by mandatory mediation. If the state ultimately rejects a court-appointed mediator's proposal, the Secretary “shall

²⁵ 25 U.S.C. 2703; 25 C.F.R. § 502.4.

²⁶ 25 U.S.C. 2710(d)(1).

²⁷ 25 U.S.C. 2710 (d)(3)(A).

²⁸ 25 U.S.C. 2710 (d)(3)(C).

²⁹ 25 U.S.C. 2710(d)(3)(B).

³⁰ 25 U.S.C. 2710(d)(8)(C).

³¹ See *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546 (10th Cir. 1997).

³² *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996) (Seminole requires federal courts to dismiss tribal complaints challenging a state's refusal to negotiate a compact when the state asserts an 11th Amendment immunity defense.)

prescribe, in consultation with the Indian tribe, procedures... under which class III gaming may be conducted.”³³

An Indian tribe may ask the Secretary to issue **Class III gaming procedures** when the following steps have taken place:

- (a) The Indian tribe submitted a written request to the State to enter into negotiations to establish a Tribal-State compact governing the conduct of Class III gaming activities;
- (b) The State and the Indian tribe failed to negotiate a compact 180 days after the State received the Indian tribe's request;
- (c) The Indian tribe initiated a cause of action in Federal district court against the State alleging that the State did not respond, or did not respond in good faith, to the request of the Indian tribe to negotiate such a compact;
- (d) The State raised an Eleventh Amendment defense to the tribal action; and
- (e) The Federal district court dismissed the action due to the State's sovereign immunity under the Eleventh Amendment.

When the secretary receives a proposal from a tribe requesting Class III gaming procedures, she has 15 days to notify the tribe that she received the proposal and 30 days to notify it if it meets eligibility requirements.

If the Secretary determines that the tribe is eligible to request Class III gaming procedures and that its proposal is complete, she must submit it to the governor and attorney general of the state where the gaming is proposed. They have 60 days to comment on whether the (1) state agrees with the proposal; (2) proposal is consistent with state law; and (3) **contemplated activities are permitted in the state for any purposes, by any person, organization, or entity**. The secretary will also ask the attorney general and governor to submit an alternative proposal.

When the 60-day comment period ends, the Secretary must review the tribe's proposal to determine if:

1. It addresses all legal requirements;
2. Class III gaming will be conducted on land under the tribe's jurisdiction;
3. **The state permits the proposed gaming;**
4. **The proposal is consistent with state law**, IGRA, and other applicable federal laws; and
5. The proposal is consistent with the trust obligations of the United States to the tribe.

Within 60 days after the comment period expires, the secretary must notify the tribe, governor, and attorney general that she has (1) approved the proposal, (2) identified unresolved issues and areas of disagreements or (3) made a final decision to either issue gaming procedures or deny the proposal. If she identifies unresolved issues, she must invite the parties to participate in an informal conference to resolve them, and within 30 days of the conference, send them a written summary of the conference discussions.³⁴

The procedures take effect when published in the Federal Register. The tribe and state may have an agreement regarding monitoring and enforcement of tribal compliance with the gaming procedures. In addition, under existing law, the NIGC will monitor and enforce tribal compliance.³⁵

There is no explicit provision under IGRA that authorizes **revenue sharing**. IGRA specifically states:

Nothing in this section shall be interpreted as conferring upon a state or any of its political subdivisions authority to impose **any tax, fee, charge, or other assessment upon** an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No state may refuse to enter into the negotiations described in paragraph (3) (A) based

³³ 25 U.S.C. 2710(d)(7). This option is addressed in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), which brought into question whether a tribe has the ability to judicially enforce the provisions of IGRA against a state. The Department of the Interior adopted rules to provide a remedy for the tribes. The validity of the rules were brought into question in *Texas v. United States*, 497 F.3d 491, (5th Cir. 2007).

³⁴ 25 CFR § 291.9.

³⁵ 25 CFR 291.12.

upon the lack of authority in such state, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.³⁶

Notwithstanding this restriction, **revenue sharing is permissible** so long as the tribe receives a **valuable economic benefit in return**. Typically, such benefit is in the form of substantial exclusivity in game offerings, geographic monopoly and/or a right to conduct such offerings on more favorable terms than non-Indians.³⁷

Designated Player Games

One category of card games are those in which players play against each other. These are referred to as “pool” games or “pari-mutuel style games.” An example of this is traditional poker, where the players fund a common pot, with the winning player getting paid from the pot. A pool game is a zero-sum game, with winnings equal to losses, subject only to any fees paid to the facility hosting the game.³⁸

Another category of card games is those in which players do not play against each other, instead they play against a “bank.” These are referred to as “banked” games. An example of a banked game is blackjack. In banked games, players do not bet against each other, instead they bet against the “bank.” There is no common pot, if a player’s hand is better than the bank’s hand, he or she wins regardless of the other players’ hands.³⁹

A banked game is not a zero-sum game. On any given hand, every player can win or lose, or there can be a combination of winners and losers. The essential feature is that the bank pays the winners and collects from the losers.⁴⁰

Section 849.086(2)(b), F.S., defines “**banking game**” as a game in which the **house is a participant** in the game, taking on players, paying winners, and collecting from losers or in which **the cardroom** establishes a bank against which participants play.⁴¹

Current law authorizes cardrooms to conduct pari-mutuel style games such as traditional poker. However, current law **prohibits** cardrooms from conducting “banking games” as defined in s. 849.086(2)(b), F.S.⁴²

In 2011, the Division began authorizing licensed pari-mutuels that operate cardrooms to conduct a particular type of card game called a “designated player game.” Designated player games are a type of banked game where players all play against a designated player. If the player’s hand is better than the designated player’s hand, then the designated player pays the player. If the designated player’s hand is better than the player’s hand, then the designated player collects the player’s wager. However, a **cardroom operator may not be the designated player** and the cardroom may not participate in the game.⁴³

In 2011, the Division also initiated rulemaking in order to establish parameters for designated player games and to ensure licensed pari-mutuels did not violate Florida statutes by offering a “banking game” as defined in s. 849.086(2)(b), F.S.⁴⁴

³⁶ 25 U.S.C. 2710(d)(4).

³⁷ See generally *In re Indian Gaming Related Cases*, 331 F.3d 1094 (9th Cir. 2003)(upholding revenue sharing where revenues were apportioned to non-gaming tribes); see also Letter From Gale A. Norton, Secretary of the Department of the Interior, to Cyrus Schindler, President of the Seneca Nation of Indians, November 12, 2002.

³⁸ *Seminole Tribe of Florida v. Florida*, 219 F.Supp. 3d 1177, 1183 (N.D. Fla. 2017); s. 849.08(1), F.S.

³⁹ *Id.* at 1183; *Dania Entertainment Center, LLC v. Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering*, 2016 WL 4567194 (Fla. Division of Administrative Hearings 2016) (Final order in case no. 15-7010RP; August 26, 2016).

⁴⁰ *Id.*

⁴¹ S. 849.086(2)(b), F.S. *Dania Entertainment Center, LLC at 4* (ALJ found that a designated player is not a cardroom operator.)

⁴² See s. 849.086, F.S.

⁴³ *Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering v. Dania Entertainment Center, LLC*, 229 So. 3d 1259, 1261 (Fla. 1st DCA 2017).

⁴⁴ *Id.* at 1261-62.

In July 2014, the Division adopted two new rules proposed by the cardrooms. Rule 61D-11.001(17), F.A.C., defined the term “designated player” to mean the player identified by the button as the player in the dealer position.⁴⁵

The second rule, Rule 61D-11.001(17), F.A.C., allowed licensed cardrooms to conduct designated player games as long as the cardroom established rules that:⁴⁶

- Establish uniform requirements to be a designated player;
- Ensure that the designated player is identified by a dealer button that rotates around the card table in a clockwise fashion on a hand by hand basis to provide each player desiring to be the designated player an equal opportunity to participate as the designated player; and
- Not require the designated player to cover all potential wagers.

In October 2015, the Division proposed repealing the rules authorizing and regulating designated player games and proposing a new rule prohibiting designated player games. At a public hearing in 2015, the Division director stated that Florida statutes do not allow designated player games and the proposed changes were to conform with state law.⁴⁷

In response to the Division’s proposed rule changes, industry members filed a rule challenge with the Division of Administrative Hearings (DOAH). The Division issued a Notice of Change and removed its proposal to add a rule prohibiting designated player games. However, the Division maintained their proposal to repeal the existing rules authorizing and regulating designated player games.⁴⁸

After a hearing at DOAH, an Administrative Law Judge (ALJ) ruled that the Division’s proposal to repeal the designated player games rules was an invalid exercise of delegated legislative authority because the Division failed to follow the rulemaking process. The ALJ also ruled that the Division lacked authority to repeal the rules because the purpose of repealing the rules was to implement the Division’s new policy that designated player games are not authorized under Florida statutes, and the Division did not have authority to establish what is an authorized game under Florida statutes.⁴⁹

The Division appealed the ALJ’s ruling to the First District Court of Appeal (DCA). **The DCA affirmed the ALJ’s ruling the Division failed to follow the rulemaking process.** However, the DCA declined to adopt the ALJ’s finding that the Division lacked authority to either promulgate or to repeal rules on designate player games, noting that the Division “is to provide meaningful and understandable standards for cardrooms, particularly where a statute is ambiguous.”⁵⁰

The DCA did not determine whether designated player games are considered “banking games” and thus illegal for cardrooms to operate.

In January 2016, the Division issued administrative complaints against multiple pari-mutuel facilities, charging that the facilities were “operating a banking game or a game not specifically authorized” by state law.⁵¹

One of the pari-mutuel facilities filed a petition with DOAH for an administrative hearing. After an evidentiary hearing at DOAH, **an ALJ ruled that the pari-mutuel facility violated the statutory prohibition of “banking games”** by conducting designated player games in a manner that **established the cardroom as a bank** against which participants play.⁵²

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 1262-63.

⁴⁹ *Id.*

⁵⁰ *Id.* at 1266.

⁵¹ Dara Kam, *State targets pari-mutuels over card games*, Tampa Bay Business Journal (Jan. 27, 2016)

<https://www.bizjournals.com/tampabay/news/2016/01/27/state-targets-pari-mutuels-over-card-games.html> (last visited May 12, 2021).

⁵² *Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering v. Jacksonville Kennel Club, Inc.*, 16-1009 (Fla. Division of Administrative Hearings 2016) (Final order August 1, 2016) (“Jacksonville’s operation of designated player games is

However, the ALJ did not rule on whether designated player games as a whole are “banking games” as defined in s. 849.086(2)(b), F.S.⁵³

In the 2016 federal court case between the state and the Seminole Tribe (Seminole Tribe), the federal court determined that the term “banking games,” as defined in s. 849.086(2)(b), F.S., includes all types of banked games including designated player games. The federal court also found that the Division’s rules regulating and authorizing designated player games did not prevent such games from falling under the definition of “banking games,” as identified in the 2010 Gaming Compact with the Seminole Tribe.⁵⁴ This ruling eventually led to the ending of revenue sharing payments by the Seminole Tribe to the State.

Currently, the Division’s rules authorizing and regulating designated player games are still in effect and according to the Division, the majority of cardrooms are currently offering designated player games.⁵⁵ However, Florida Statutes do not specifically state whether designated player games conducted at cardrooms are legal or not.

If the 2021 Compact is ratified and approved, the 2021 Compact specifically indicates that designated player games, as authorized by the state prior to the enactment of Article X, Section 30 of the Florida Constitution, where one player is permitted but not required to cover other players' wagers, do not violate the Seminole Tribe exclusivity provisions, if the following requirements are met:⁵⁶

- Cardrooms are restricted to offering only those specific designated player card games that were identified in cardroom license applications approved by the Division on or before March 15, 2018, or any substantially similar poker games that were identified in cardroom license applications approved on or before April 1, 2021;
- Cardrooms are limited to offering no more than 10 designated player card tables, if the cardroom is located in a county where slot machines are operated, or 30 designated player card tables, if the cardroom is not located in a county where slot machines are operated;
- Cardroom operators may not have any direct economic interest in a designated player game except for the rake; and
- Cardroom operators may not receive any portion of the designated player's winnings.

The Compact provides that if the operation of all designated player card games ceases, then for so long as all such games remain out of operation, the Seminole Tribe agrees to increase each of the revenue share percentages set forth in Part XI, Section C.1 of the Compact by one percent.⁵⁷

Sports Betting

Although sports betting dates back many centuries, even occurring in ancient Greece on events such as Olympic competitions, the regulation of sports betting in the United States is only decades old.⁵⁸

In 1949, Nevada became the first state to legalize sports betting.⁵⁹ The only federal law relating to sports betting was the imposition of a wagering excise tax that was passed in 1951.⁶⁰ In the

no more than a systematic banking of games in the cardroom. The corporate application requirements, combined with the dual-rake structure, are disincentives to the rotation of the button and participation in the game by truly interested designated players. The result is game play in which employees from an outside corporate designated player sit either idly at racks of chips, or, alternately, organize the chips for the convenience of the dealer in taking the rake and place chips into the racks according to denomination.”)

⁵³ *Id.*

⁵⁴ *Seminole Tribe of Florida*, 219 F.Supp. 3d 1177, 1188.

⁵⁵ Rules 61D-11.001(16), and 61D-11.002(4), F.A.C.; Florida House of Representatives, Gaming 102: Current Gaming Landscape (video), Legislator University <https://www.myfloridahouse.gov/legislaturu> (last visited May 13, 2021).

⁵⁶ *2021 Gaming Compact Between the Seminole Tribe of Florida and the State of Florida*, pgs. 57-60 (Apr. 23, 2021).

⁵⁷ *Id.*

⁵⁸ Jennifer Roberts, Greg Gemignani, *Who Wore It Better? Federal v. State Government Regulation of Sports Betting*, 9 UNLV GAMING L.J. 77, 77–78 (2019).

⁵⁹ *Id.* at 78.

⁶⁰ *Id.*

subsequent decades, a few other states legalized sports betting in various forms: Montana in 1973, Delaware in 1976, and Oregon in 1989.⁶¹

However, in 1992, the federal Professional and Amateur Sports Protection Act (PASPA)⁶² became law and prohibited states and Indian tribes from allowing sports betting, except for states that were grandfathered in.⁶³ As the means of enforcement, PASPA provided a civil action to enjoin a violation that could be commenced in federal court by the Attorney General of the United States or by a professional sports organization or amateur sports organization whose competitive game was alleged to be the basis of such violation.⁶⁴ The states which were grandfathered in, and were thus exempt from PASPA's prohibition, were Nevada, Montana, Delaware, and Oregon.⁶⁵ New Jersey could have qualified for a PASPA exemption, but the state missed the one-year window in which to pass legislation qualifying the state for such exemption.⁶⁶

The passage of PASPA essentially froze the status of sports betting in the United States.⁶⁷ PASPA's prohibition against state-regulated sports wagering resulted in an illegal market in the United States consisting of local bookies and offshore websites with an estimated size of \$80 billion to \$380 billion annually.⁶⁸ In a 2015 online consumer survey, Ernst & Young found that approximately 28% of U.S. adults bet on sports, wagering an average of \$1,554 over the previous 12 months.⁶⁹ As applied to the currently available demographic data for Florida, these figures equate to approximately \$7.5 billion in estimated annual sports betting in Florida.⁷⁰

In 2011, New Jersey voters approved a state constitutional amendment making it lawful for the legislature to authorize sports gambling, and the following year the legislature authorized sports gambling.⁷¹ The major professional sports leagues and the National Collegiate Athletic Association then brought an action in federal court against the New Jersey Governor and other state officials to enjoin the new law on the ground that it violated PASPA.⁷² The United States Supreme Court (USSC) eventually heard the case and held that PASPA's prohibition on state authorization of sports gambling is unconstitutional because it violates the anti-commandeering rule under which Congress is prohibited from commandeering the legislative process of states by directly compelling them to enact and enforce a federal regulatory program.⁷³

Since the USSC's decision, sports betting has been adopted in 20 states and the District of Columbia, and is legal but not yet operational in another five states.⁷⁴ North Carolina, New Mexico and Washington have not approved it statewide, but have worked with Native American governments to authorize it at tribal casinos.⁷⁵ Many states have also made sports betting available on the internet.⁷⁶ Intrastate mobile sports betting, which has been implemented or authorized in 14 states, the District of Columbia and Puerto Rico, lets bettors wager from a cellphone or computer.⁷⁷ The mobile applications

⁶¹ *Id.* at 81.

⁶² Pub. L. 102-559, codified at 28 U.S.C. § 3701 *et seq.*

⁶³ 28 U.S.C. §§ 3702 and 3704.

⁶⁴ 28 U.S.C. § 3703.

⁶⁵ Roberts and Gemignani, *supra* note 68, at 54.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 84.

⁶⁹ Oxford Economics, *Economic Impact of Legalized Sports Betting* (May 2017), https://www.americangaming.org/wp-content/uploads/2019/02/AGA-Oxford-Sports-betting-impacts-2017-May_FINAL-report.pdf (last visited May 12, 2021).

⁷⁰ *Id.*; Office of Economic & Demographic Research, *Florida Population by Age Group*, http://edr.state.fl.us/Content/population-demographics/data/pop_census_day-2019.pdf (last visited May 12, 2021).

⁷¹ *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1471 (2018).

⁷² *Id.*

⁷³ *Id.* at 1467 and 1478.

⁷⁴ Jack Brainerd, *More States Let Sports Betting Go Mobile* (Mar. 1, 2021), <https://www.ncsl.org/research/fiscal-policy/more-states-let-sports-betting-go-mobile-magazine2021.aspx> (last visited May 12, 2021).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

use geolocation data to ensure bets can be placed only from inside state lines.⁷⁸ Of the states that have not broadly legalized mobile betting, three allow it very narrowly: Mississippi, Montana and Washington allow mobile bets to be placed only while on casino premises.⁷⁹

As for the current status of sports betting in Florida, sports betting is currently illegal in Florida and carries with it criminal penalties.⁸⁰ Additionally, in 2018, Florida voters ratified Amendment 3, codified as article X, section 30 of the Florida Constitution. By the amendment's own terms, the amendment seeks to ensure that Florida voters rather than the Legislature, have the exclusive right to decide whether to authorize casino gambling in Florida. However, the amendment does not:

- Limit the Legislature's authority to restrict, regulate, or tax any gaming or gambling activities.
- Limit the ability of the state or Native American tribes to negotiate gaming compacts pursuant to the Indian Gaming Regulatory Act (IGRA) for the conduct of casino gambling on tribal lands.⁸¹
- Affect any existing gambling on tribal lands pursuant to compacts executed by the state and Native American tribes pursuant to IGRA.

Amendment to Florida Constitution Related to Expansion of Gambling – “Voter Control of Gambling in Florida”

During the 2018 General Election, the electorate approved an initiative constitutional amendment – Amendment 3, “Voter Control of Gambling in Florida”. The amendment is codified in the State Constitution as Article X, Section 30,⁸² which states:

This amendment ensures that Florida voters shall have the exclusive right to decide whether to authorize casino gambling in the State of Florida. This amendment **requires a vote by citizens’ initiative** pursuant to Article XI, section 3, **in order for casino gambling to be authorized** under Florida law. This section amends this Article; and also affects Article XI, by making citizens’ initiatives the exclusive method of authorizing casino gambling.

As used in this section, “casino gambling” means any of the types of games typically found in casinos and that are within the definition of Class III gaming in the Federal Indian Gaming Regulatory Act, 25 U.S.C. ss. 2701 et seq. (“IGRA”), and in 25 C.F.R. s. 502.4, upon adoption of this amendment, and any that are added to such definition of Class III gaming in the future. This includes, but is not limited to, any house banking game, including but not limited to card games such as baccarat, chemin de fer, blackjack (21), and pai gow (if played as house banking games); any player-banked game that simulates a house banking game, such as California black jack; casino games such as roulette, craps, and keno; any slot machines as defined in 15 U.S.C. s. 1171(a)(1); and any other game not authorized by Article X, section 15, whether or not defined as a slot machine, in which outcomes are determined by random number generator or are similarly assigned randomly, such as instant or historical racing. As used herein, “casino gambling” includes any electronic

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *See, e.g.*, s. 849.11, F.S., which provides a second-degree misdemeanor for any person who “sets up, promotes or plays at any game of chance by lot or with dice, cards, numbers, hazards or any other gambling device whatever for, or for the disposal of money or other thing of value or under the pretext of a sale, gift or delivery thereof, or for any right, share or interest therein; s. 849.14, F.S., which provides a second-degree misdemeanor for any person who “stakes, bets or wagers any money or other thing of value upon the result of any trial or contest of skill, speed or power or endurance of human or beast, or whoever receives in any manner whatsoever any money or other thing of value staked, bet or wagered, or offered for the purpose of being staked, bet or wagered, by or for any other person upon any such result, or whoever knowingly becomes the custodian or depositary of any money or other thing of value so staked, bet, or wagered upon any such result, or whoever aids, or assists, or abets in any manner in any of such acts all of which are hereby forbidden.”

⁸¹ Sports betting is classified as Class III gaming under IGRA regulations. See 25 C.F.R. § 502.4(c) (“*Class III gaming* means all forms of gaming that are not class I gaming or class II gaming, including but not limited to: . . . [a]ny sports betting and pari-mutuel wagering including but not limited to wagering on horse racing, dog racing or jai alai . . .”).

⁸² See the text of Amendment 3, now codified as art. X, s. 30, at

<http://www.leg.state.fl.us/Statutes/index.cfm?Mode=Constitution&Submenu=3&Tab=statutes&CFID=44933245&CFTOKEN=f39b1ca7cab71561-BE329BC7-5056-B837-1A6123F335C4849F#A10S30> (last visited Apr. 7, 2021).

gambling devices, simulated gambling devices, video lottery devices, internet sweepstakes devices, and any other form of electronic or electromechanical facsimiles of any game of chance, slot machine, or casino-style game, regardless of how such devices are defined under IGRA. As used herein, “casino gambling” does not include pari-mutuel wagering on horse racing, dog racing, or jai alai exhibitions. For purposes of this section, “gambling” and “gaming” are synonymous.

Nothing herein shall be deemed to limit the right of the Legislature to exercise its authority through general law to restrict, regulate, or tax any gaming or gambling activities. In addition, nothing herein shall be construed to limit the ability of the state or Native American tribes to negotiate gaming compacts pursuant to the Federal Indian Gaming Regulatory Act for the conduct of casino gambling on tribal lands, or to affect any existing gambling on tribal lands pursuant to compacts executed by the state and Native American tribes pursuant to IGRA.

Article X, section 30 requires a vote proposed by citizen’s initiative to amend the State Constitution to authorize “casino gambling” in Florida.

Casino gambling is defined as:

- Any of the “types of games typically found in casinos” and that are:
 - Within the definition of Class III gaming in:
 - The Federal Indian Gaming Regulatory Act⁸³, and
 - 25 C.F.R. § 502.4.

Casino gambling includes but is not limited to the following:

- Any house banking game, including but not limited to card games such as baccarat, chemin de fer, blackjack (21), and pai gow (if played as house banking games);
- Any player-banked game that simulates a house banking game, such as California blackjack;
- Casino games such as roulette, craps, and keno;
- Any slot machines as defined in 15 U.S.C. 1171(a)(1); and
- Any other game not authorized by Article X, section 15 of the State Constitution, relating to state operated lotteries, whether or not defined as a slot machine, in which outcomes are determined by random number generator or are similarly assigned randomly, such as instant or historical racing.

“Casino gambling” is defined to include the following devices:

- Any electronic gambling devices;
- Simulated gambling devices;
- Video lottery devices;
- Internet sweepstakes devices; and
- Any other form of electronic or electromechanical facsimiles of any game of chance, slot machine, or casino-style game, regardless of how such devices are defined under the Indian Gaming Regulatory Act.

“Casino gambling” does not include pari-mutuel wagering on horse racing, dog racing, or jai alai exhibitions.

By its terms, the Amendment became effective on November 6, 2018, is self-executing, and no legislative implementation is required.

The constitutional amendment does not limit the ability of the state to negotiate tribal compacts:

“In addition, nothing herein shall be construed to limit the ability of the state or Native American tribes to negotiate gaming compacts pursuant to the Federal Indian Gaming Regulatory Act for

⁸³ 25 U.S.C. 2701 et seq;
STORAGE NAME: h0001Ad.SCG
DATE: 5/17/2021

the conduct of casino gambling on tribal lands, or to affect any existing gambling on tribal lands pursuant to compacts executed by the state and Native American tribes pursuant to IGRA.”

Effect of the Bill

Ratification

The bill ratifies and approves the 2021 Compact between the Seminole Tribe and the state, executed by the Governor and the Seminole Tribe on April 23, 2021, as amended on May 17, 2021. If ratified, the 2021 Compact will supersede the 2010 Compact. If the compact is not approved by the Secretary of the United States Department of the Interior or is invalidated by court action or change in federal law, the 2010 Compact will remain in effect. The 2021 Compact has a term of 30 years.

The bill requires the Governor to cooperate with the Seminole Tribe in seeking approval of the 2021 Compact from the United States Secretary of the Interior.

The bill allows the Seminole Tribe to **continue to conduct** the following types of games that were previously authorized in s. 285.710, F.S.:

- Slot machines;
- Raffles and drawings; and
- Banked card games, including baccarat, chemin de fer, and blackjack (21).

In addition, the bill allows the Seminole Tribe to conduct the following **new games**:

- Craps, including dice games such as sic-bo and any similar variations;
- Roulette, including big six and any similar variations;
- Fantasy sports contests; and
- Sports betting (at casinos and on mobile devices).

The 2021 Compact provides that any of the seven facilities existing on Indian Lands identified in Part IV, Section B of the compact may be relocated, expanded or replaced by another facility on the same Indian land with advance notice to the state of sixty calendar days. However, the Seminole Tribe agrees that it will not build Las Vegas-style casino resorts on its Brighton Reservation (Okeechobee, FL) or Big Cypress Reservation (Clewiston, FL).

The bill provides that wagers on fantasy sports contests conducted by the Seminole Tribe, including wagers made by players physically located within the state using a mobile or other electronic device, are deemed to be exclusively conducted by the Seminole Tribe where the servers or other devices used to conduct such wagering activity on the Seminole Tribe’s Indian lands are located. A person must be 21 years of age or older to wager on fantasy sports contests.

The bill provides that wagers on sports betting, including wagers made by players physically located within the state using a mobile or other electronic device, are deemed to be exclusively conducted by the Seminole Tribe where the servers or other devices used to conduct such wagering activity on the Seminole Tribe’s Indian lands are located. A person must be 21 years of age or older to wager on sports betting.

The bill provides that games and gaming activities authorized and conducted pursuant to the ratified and approved gaming compact do not violate the laws of this state.

Slot Machines

The bill replaces the current law, which requires an independent testing laboratory hired by the Division of Pari-Mutuel Wagering to be demonstrably competent and qualified to scientifically test and evaluate slot machines for compliance and to otherwise perform the functions assigned to it, with an independent testing laboratory:

- With demonstrated competence testing gaming machines and equipment;
- That is licensed by at least 10 other states; and

- That has not had its license suspended or revoked by any other state within the immediately preceding 10 years.

Designated Player Games

The 2021 Compact indicates that poker games played in the designated player manner, as authorized by the state prior to the enactment of Article X, s. 30 of the Florida Constitution, will not violate the 2021 Compact exclusivity provisions **if restrictions are enacted in state law and implemented by rule**, if appropriate, prior to, or within twelve months following the effective date of the compact.

The bill provides the following conditions for operating a cardroom with poker games played in a designated player manner in which one player is permitted, but not required, to cover other players' wagers:

- Poker games to be played in a designated player manner must have been identified in cardroom license applications approved by the Division on or before March 15, 2018, or, if a substantially similar poker game, identified in cardroom license applications approved by the division on or before April 1, 2021.
- If the cardroom is located in a county where slot machine gaming is authorized under chapter 285, F.S., or chapter 551, F.S., the cardroom operator is limited to offering no more than 10 tables for the play of poker games in a designated player manner.
- If the cardroom is located in a county where slot machine gaming is not authorized under chapter 285, F.S., or chapter 551, F.S., the cardroom operator is limited to offering no more than 30 tables for the play of poker games in a designated player manner.
- There may not be more than nine players and the nonplayer dealer at each table.

The bill prohibits a cardroom operator from:

- Having any direct economic interest in a poker game played in a designated player manner, except for the rake.
- Receiving any portion of the winnings of a poker game played in a designated player manner.
- Operating any game that violates the exclusivity provided in the gaming compact ratified, approved, and described in s. 285.710(3), F.S.

The 2021 Compact provides that if the operation of all designated player card games ceases, then for so long as all such games remain out of operation, the Seminole Tribe agrees to increase its revenue share percentages by one percent.

Sports Betting

The 2021 Compact authorizes the Seminole Tribe to offer sports betting on professional and collegiate sport events by players physically located in the State who may use a mobile or other electronic device, exclusively by and through sports books conducted and operated by the Seminole Tribe, which must contract with any willing, qualified pari-mutuel permitholder to perform marketing and similar services in support of the sports books, for compensation of not less than 60% of the profit associated with wagering by the permitholder's registered patrons through the permitholder's branded website or mobile application. Such wagering is to be deemed to be exclusively conducted by the Seminole Tribe where the servers or other devices used to conduct such wagering activity on the Seminole Tribe's Indian lands are located.

The 2021 Compact defines "sports betting" to mean wagering on past or future professional sports or athletic event or contest, Olympic sport or international event, any collegiate sport or motor vehicle race, but NOT proposition bets on collegiate sports. The term does not include Fantasy Sports Contests, pari-mutuel wagering, or betting on any form of poker or other card game.

Fantasy Sports Contests

The bill provides that the acceptance of entry fees on fantasy sports contests conducted by the Seminole Tribe, including the receipt of entry fees paid by players physically located within the state

using a mobile or other electronic device, shall be deemed to be exclusively conducted by the Seminole Tribe where the servers or other devices used to conduct such contests on the Seminole Tribe's Indian lands are located. A person must be 21 years of age or older to pay an entry fee for fantasy sports contests.

Local Government Share

The bill revises the local government share of distributions based upon the net win per tribal facility as provided by the Seminole Tribe, as follows:

- Shares derived from the Seminole Indian Casino-Hollywood to the City of Hollywood are decreased from 55 percent to 40 percent, and to the Town of Davie are increased from 10 percent to 25 percent.
- Shares derived from the Seminole Hard Rock Hotel & Casino-Hollywood to the City of Hollywood are decreased from 55 percent to 40 percent, and to the Town of Davie are increased from 10 percent to 25 percent.
- Shares derived from the Seminole Indian Casino-Immokalee to Collier County are decreased from 100 percent to 75 percent, and 25 percent of the shares are directed to the Immokalee Fire Control District.

Payments

The 2021 Compact establishes a guarantee minimum payment period that is the first five years of the compact. During the five year period, the Seminole Tribe will make guaranteed minimum revenue share payments as specified, to total \$2.5 billion. The revenue share payments must be paid by the Seminole Tribe to the state as follows:

- Percentage payments for slots, raffles, drawings, and new games range from 12 percent of net win up to \$2 billion, to 25 percent of net win greater than \$3.5 billion.
- Percentage payments for table games range from 15 percent of net win up to \$1 billion, to 25 percent of net win greater than \$2 billion.
- Percentage payment for tribal sports betting is 13.75 percent of net win excluding the net win received by the Seminole Tribe on pari-mutuel sports betting.
- Percentage payment for pari-mutuel sports betting is 10 percent of net win received by the Seminole Tribe on pari-mutuel sports betting.
- The Seminole Tribe's guaranteed minimum revenue share payment is \$400 million per year for the first five years.
- At the end of the third year of the five year guaranteed minimum payment period, if the total revenue share payments are less than \$1.5 billion, the Seminole Tribe must pay the difference to the state.
- At the end of the fifth year of the five year guaranteed minimum payment period, if the total revenue share payments are less than \$2.5 billion, the Seminole Tribe must pay the difference to the state.

The specific revenue share payment amounts paid by the Seminole Tribe to the state will be calculated as outlined in the chart below in accordance with the 2021 Compact, as compared to the amounts in the 2010 Compact:

REVENUE SHARE TO THE STATE (% OF NET WIN)	
2010 Compact	*NEW* 2021 Compact
<u>ALL COVERED GAMES</u> \$0-\$2 billion = 12% \$2-\$3 billion = 15% \$3-\$3.5 billion = 17.5% \$3.5-\$4 billion = 20%	<u>TABLE GAMES</u> \$0-\$1 billion = 15% \$1-\$1.5 billion = 17.5% \$1.5-\$2 billion = 22.5% \$2 billion and more = 25%

\$4-\$4.5 billion = 22.5% \$4.5 billion and more = 25%	<u>SLOTS, RAFFLES, & DRAWINGS</u> \$0-\$2 billion = 12% \$2-\$2.5 billion = 17.5% \$2.5-\$3 billion = 20% \$3-\$3.5 billion = 22.5% \$3.5 billion and more = 25%
	<u>SPORTS BETTING</u> Direct Net Win from Tribe Marketing = 13.75% Indirect Net Win through Pari-mutuels = 10%

Exclusivity Requirements

The 2021 Compact provides the Seminole Tribe with the exclusive right to operate certain covered games without state authorized competition. In return, the Seminole Tribe agrees to make revenue share payments to the state based on its net winnings.

If, after January 1, 2021:

- Florida law is amended by action of the Legislature or by an amendment to the Florida Constitution that is initiated by the Legislature, to authorize Class III gaming (including sports betting) or other casino-style gaming at any location within 100 miles from a tribal facility, then:
 - Revenue share payments and the annual compulsive gambling donation by the Seminole Tribe to the state must cease.
- A court order or administrative ruling authorizes an expansion of new Class III gaming (including sports betting) or other casino-style gaming at any location within 100 miles from a tribal facility, then:
 - Revenue share payments and the annual compulsive gambling donation by the Seminole Tribe to the state must go into an escrow account to provide the Legislature with the opportunity to pass legislation to reverse such decision or ruling.
- The Florida Constitution is amended, without action by the Legislature, by citizen initiative pursuant to Article XI, s. 3 of the Florida Constitution, to authorize Class III gaming or other casino-style gaming at any location less than 100 miles on a straight line from a tribal facility, other than the relocation of a pari-mutuel license or permit pursuant to the compact, then:
 - The Seminole Tribe must reduce its revenue share payments due to the State on the net win on covered games by excluding the net win (other than on sports betting) from any facility within 100 miles of the new location where the games in violation are being offered.
- The Florida Constitution is amended, without action by the Legislature, by citizen initiative pursuant to Article XI, s. 3, of the Florida Constitution, to authorize sports betting, other than at a tribal facility as specified in the compact, then:
 - The Seminole Tribe must reduce its payments due to the state on the net win on covered games by excluding net win from sports betting.

If the state enters into a compact with another Indian tribe and authorizes sports betting in the state but not on Indian lands, the Seminole Tribe's revenue share payments on sports betting net win are reduced by 25 percent, but may not be less than ten percent of the net win received by the Seminole Tribe from the operation and play of sports betting during each revenue sharing cycle, including the net win received by the Seminole Tribe from pari-mutuel sports betting.

The Seminole Tribe's obligation to make the guaranteed minimum compact term payment (\$2.5 billion) must cease if:

- The state violates the Seminole Tribe's exclusivity and the state fails to cure such violation within 180 days after notice of such breach by the Seminole Tribe; or
- The Seminole Tribe's authorization to conduct the Covered Games is invalidated, in whole or in part, as a result of a court decision.

However, if at any time the Seminole Tribe is not legally permitted to offer sports betting as described in the 2021 Compact, including to patrons physically located in the state but not on Indian lands, or the Seminole Tribe loses the exclusive right to offer sports betting by citizen initiative or by allowing other tribes to conduct sports betting in the state but not on Indian lands, then:

- The Seminole Tribe's obligation to pay the full guaranteed minimum compact term payment and the other minimum payments are reduced by ten percent.

Exceptions to Violations of the 2021 Compact Exclusivity Requirements

The 2021 Compact provides that the Legislature may authorize non-tribe pari-mutuel wagering entities to conduct the following actions without affecting revenue sharing:

- The operation of slot machines, which does not include any game played with tangible playing cards, at each of the four currently operating licensed pari-mutuel facilities in Broward County or at the four currently operating licensed pari-mutuel facilities in Miami-Dade County, as long as:
 - The relocation of such slot machines occur within one hundred miles on a straight line from any tribal facility in a county outside of Broward or Miami-Dade County, or within 15 miles of a tribal facility in Broward or Miami-Dade County, without the Seminole Tribe's consent.
- If state law is changed to authorize the operation of more than two thousand Slot Machines at any of the four licensed pari-mutuel facilities in Broward County or the four licensed pari-mutuel facilities in Miami-Dade County, which are authorized to operate Slot Machines, the guaranteed minimum payments from the Seminole Tribe to the state cease and the percentage payments are calculated excluding the Seminole Tribe facilities located in Broward County.
- The operation of a combined total of not more than Three Hundred Fifty Historic Racing Machines, connected to a central server at that facility, and Electronic Bingo Card Minders, at each pari-mutuel facility licensed as of January 1, 2021, and not located in either Broward County or Miami-Dade County.
- The operation of Pari-Mutuel Wagering Activities at pari-mutuel facilities licensed by the state.
- The operation of poker at cardrooms licensed by the state, but not including any game banked by the house, a player or any other person or entity.

Online Gaming

The 2021 Compact indicates that, upon ratification and approval, the State of Florida and the Seminole Tribe agree to engage in good faith negotiations within 36 months after the effective date of the compact to consider an amendment to authorize the Seminole Tribe to offer all types of covered games online or via mobile devices to players physically located in the state.

In Part XVIII of the 2021 Compact states:

- A. The State and the Tribe agree to engage in good faith negotiations within thirty-six (36) months after the Effective Date of this Compact to consider an amendment to authorize the Tribe to offer all types of Covered Games online or via mobile devices to players physically

located in the State, where such wagers made using a mobile device or online shall be deemed to take place exclusively where received at the location of the servers or other devices used to conduct such wagering activity at a Facility on Indian Lands. Any dispute over whether a party has engaged in good faith negotiations under this Part shall not be subject to suit pursuant to Part XIII, and this Part is not a waiver of the State's sovereign immunity from suit over claims alleging the failure to negotiate in good faith, as recognized in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

In response to questions related to this part of the compact, the Seminole Tribe explained the provision and its implications in a letter to the Governor, the President of the Senate and the Speaker of the House. The substance of the Seminole Tribe's letter, dated May 12, 2021, and signed by Marcellus W. Osceola, Jr., Chairman of the Seminole Tribe of Florida, concludes that the good faith provision is only a commitment to "engage in good faith negotiations."

The Seminole Tribe's letter states:

"The question that has been asked is whether the Tribe would have a remedy if the State failed to negotiate such an amendment or to negotiate in good faith. The simple answer is that the Tribe would not have a remedy."

"Part XVIII.A is simply an agreement to continue discussions about online gaming, but there is no enforcement mechanism if the State fails to engage in such discussions. In fact, Part XVIII.A is absolutely clear on this point: "Any dispute over whether a party has engaged in good faith negotiations under this Part shall not be subject to suit pursuant to Part XVII, and this Part is not a waiver of the State's sovereign immunity from suit over claims alleging the failure to negotiate in good faith, as recognized in the *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996)." This language means that a claimed violation of this provision is not enforceable through the Compact's dispute resolution provision and is not enforceable in court, since the State is protected by sovereign immunity."

"The Tribe also would not be able to enforce this provision through Class III "procedures" from the Secretary of the Interior. Procedures are only available with respect to gaming permitted by the State. The State of Florida does not permit online gaming. Thus, the Tribe has no claim to seek procedures for online gaming from the Secretary. To the extent that there is any uncertainty concerning this matter, I am authorized to state on behalf of the Tribe that it commits that it will not attempt to enforce Part XVIII.A through litigation, procedures from the Secretary or any other means. As you know, the Tribe has always kept its word in its dealings with the State."

While the Seminole Tribe letter may not be legally binding, the case law regarding this issue appears to support the conclusion that the provision is not enforceable against the state.

In addition, the Seminole Tribe does not appear to be eligible for Class III Procedures, pursuant to 25 C.F.R. Part 291, because the Secretary of Interior can only approve such procedures **if the "contemplated gaming activities are permitted in the State for any purposes by any person, organization, or entity."**⁸⁴ This means that the Florida Legislature would have to approve and legalize online gaming in the state before the Tribe could request such procedures. Therefore, as long as online gaming remains unlawful in the State of Florida, Class III procedures for this gaming activity will be unavailable.

B. SECTION DIRECTORY:

Section 1 Amends s. 285.710, F.S., relating to compact ratification, effective upon becoming law.

Section 2: Amends s. 285.710, F.S., relating to compact authorization.

⁸⁴ See 25 C.F.R. 291.8(a)(3) and 25 C.F.R. 291.8(c)(2).

- Section 3: Amends s. 285.712, F.S., relating to tribal-state gaming compacts.
- Section 4: Amends s. 551.102, F.S., relating to definitions.
- Section 5: Amends s. 551.103, F.S., relating to powers and duties of the division and law enforcement.
- Section 6: Amends s. 849.086, F.S., relating to cardrooms authorized.
- Section 7: Provides an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The Revenue Estimating Conference (REC) estimated that, if ratified by the Legislature and approved by the Secretary of the Interior, the 2021 Compact will have positive cash and recurring impacts on the General Revenue Fund of \$355.6 million in FY 2021-22; \$450.7 million in FY 2022-23; \$472.0 million in FY 2023-24; \$638.1 million in FY 2024-25 and \$518.2 million in FY 2025-26.

2. Expenditures:

Indeterminate. Direct costs of regulation are able to be recovered pursuant to the terms of the bill. The Division currently enforces the 2010 Gaming Compact. Any additional expenditure related to law enforcement, courts, infrastructure and social services will likely be minimal and absorbed by current staff.

To offset the cost of regulation, the Division receives an Annual Oversight Assessment, to be paid to the state as reimbursement for the actual and reasonable costs of the Division to perform monitoring functions, as provided for in the 2010 Compact. The assessment shall not exceed \$250,000 per year, indexed for inflation by the Consumer Price Index (CPI), and paid in quarterly installments. The 2021 Compact increases the Annual Oversight Assessment to \$600,000 per year, also indexed as determined by the CPI and paid in quarterly installments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The REC estimated that, if the 2021 Compact is ratified by the Legislature and approved by the Secretary of the Interior, the bill will result in sharing of revenue received by the state under the 2021 Compact with local governments. Staff estimates the cash and recurring impacts on local government revenues will be \$10.7 million in FY 2021-22; \$13.5 million in FY 2022-23; \$14.2 million in FY 2023-24; \$19.1 million in FY 2024-25 and \$15.5 million in FY 2025-26.

2. Expenditures:

Indeterminate. There may be expenditures and impacts on local government infrastructure as a result of increased gaming activities.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill authorizes a gaming compact that would permit the Seminole Tribe to conduct additional games at all seven tribal locations, and sports betting on tribal lands and via mobile devices. Therefore, the Seminole Tribe will have a revenue increase. The REC estimated the 2021 Compact will have the following positive fiscal impact to the Tribe's net wins:

Fiscal Year	Current Net Win Forecast 2010 Compact (in billions)	Forecast of Net Win 2021 Compact (in billions)	Revenue Increase for the Tribe (in billions)
2021-22	\$2.5059	\$3.3078	\$0.8019
2022-23	\$2.6302	\$3.4996	\$0.8694
2023-24	\$2.6917	\$3.6295	\$0.9378
2024-25	\$2.7799	\$3.7869	\$1.0070
2025-26	\$2.8541	\$3.9321	\$1.0780

Additionally, the 2021 Compact requires the Tribe to make an annual donation to the Florida Council on Compulsive Gaming (FCCG), in an amount not less than \$250,000 for each facility.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to affect county or municipal governments.

2. Other:

The 2021 Compact exclusively authorizes the Seminole Tribe to conduct sports betting in the state of Florida, including the use a mobile or other electronic devices. The Seminole Tribe must contract with any willing, qualified pari-mutuel permitholder to perform marketing and similar services in support of the sports books, for compensation of not less than 60% of the profit associated with wagering by the permitholder's registered patrons through the permitholder's branded website or mobile application. Such wagering is to be deemed to be exclusively conducted by the Seminole Tribe where the servers or other devices used to conduct such wagering activity on the Seminole Tribe's Indian lands are located.

Art. X, Sec. 30 of the Florida Constitution states:

Nothing herein shall be deemed to limit the right of the Legislature to exercise its authority through general law to restrict, regulate, or tax any gaming or gambling activities. In addition, nothing herein shall be construed to limit the ability of the state or Native American tribes to **negotiate gaming compacts pursuant to the Federal Indian Gaming Regulatory Act** for the conduct of casino gambling on tribal lands, or to affect any existing gambling on tribal lands pursuant to compacts executed by the state and Native American tribes pursuant to IGRA.

Based on the language included in the constitution, it does not appear to limit the legislature's ability to ratify a compact for approval in accordance with IGRA. However, the courts have not interpreted this provision of the constitution.

IGRA governs gambling on tribal lands. According to the opinion of the National Indian Gaming Commission, it is unclear whether tribes can accept online wagers from bettors who are not on

Indian lands. One of the purposes of IGRA is to establish independent federal regulatory authority and standards for gaming **on Indian lands** (25 U.S.C. § 2702(3)). IGRA only applies to gaming on "Indian lands", which are defined as: All lands within the limits of any Indian reservation. (25 U.S.C. § 2703(4).) Therefore, the Department of the Interior or a court may need to determine whether approved sports betting is gaming on "Indian lands."⁸⁵

In a games classification advisory opinion, the National Indian Gaming Commission noted that "the use of the Internet, even though the computer server may be located on Indian lands, would constitute off-reservation gaming to the extent any of the players were located off of Indian lands." (13 March 2011, letter from Kevin K Washburn, General Counsel, NIGC, to Joseph Speck, Nic-A-Bob Productions, enclosing 22 June 1999, letter from Montie R Deer, Chairman, NIGC, to Ernest L Stensgar, Chairman, Coeur d'Alene Tribe, re: National Indian Lottery).⁸⁶

In addition, in *State of California and United States of America v. Iipay Nation of Santa Ysabel*, 898 F.3d 960 (Ninth Cir. 2018), the Ninth Circuit determined that gaming activity using server-based internet gaming violated the Unlawful Internet Gambling Enforcement Act (UIGEA) because the placing of a bet was not on tribal lands.

The NIGC has expressly defined Class III gaming to include "[a]ny sports betting and pari-mutuel wagering." This definition does not expressly exempt any form of sports betting and treats parimutuel wagering as Class III despite the fact that players wager amongst themselves. The NIGC has also opined that sports wagering could not be the subject of a tribal-state compact because "if sports betting is unlawful in a state, it is unlawful for tribes in that state to engage in it."⁸⁷ Further determination by the NIGC may need to be made related to the manner in which the sports wagering occurs, which can generally be classified in one of three categories – pari-mutuel wagering, fixed odds wagering, and exchange wagering.

Should a challenge occur, the Compact accounts for provisions being challenged or determined to be invalid. The Compact indicates that the Seminole Tribe's obligation to make the guaranteed minimum compact term payment (\$2.5 billion) must cease if the Seminole Tribe's authorization to conduct the Covered Games is invalidated, in whole or in part, as a result of a court decision. **However**, if at any time the Seminole Tribe is not legally permitted to offer sports betting as described in the 2021 Compact, including to patrons physically located in the state but not on Indian lands, or the Seminole Tribe loses the exclusive right to offer sports betting by citizen initiative or by allowing other tribes to conduct sports betting in the state but not on Indian lands, then: The Seminole Tribe's obligation to pay the full guaranteed minimum compact term payment and the other minimum **payments are reduced by ten percent**.

Since the status of online sports betting is unclear, legal challenges may arise. Challenges under IGRA would likely be addressed in federal court, and challenges under Art. X, Sec. 30 of the Florida Constitution may be addressed in state court.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

⁸⁵ Gaming in the United States: Native American: overview, Practical Law Country Q&A 6-634-9185

⁸⁶ Jennifer L. Carleton, Internet Gaming on Indian Lands, <https://www.nvbar.org/wp-content/uploads/InternetGamingIndianLandArticle.pdf> (last visited May 16, 2021).

⁸⁷ *Id.*; See 8 WIN Sports Betting Game Classification Op., Nat'l Indian Gaming Comm'n (March 13, 2001) available at <https://www.nigc.gov/images/uploads/gameopinions/nationalindianbingo111400.pdf>.

On May 17, 2021, the Select Subcommittee on the Seminole Gaming Compact adopted four amendments and passed the bill favorably as a committee substitute. The amendments:

- Revise references to the 2021 Compact to reflect that the Compact was amended on May 17, 2021.
- Amend the local government share distributions derived from the Seminole Indian Casino-Hollywood, so that the City of Hollywood will receive 40 percent and the Town of Davie will receive 25 percent.
- Amend the local government share distributions derived from the Seminole Hard Rock Hotel & Casino-Hollywood, so that the City of Hollywood will receive 40 percent and the Town of Davie will receive 25 percent.
- Conform terminology related to fantasy sports contests.

This analysis is drafted to the committee substitute as passed by the Select Subcommittee on the Seminole Gaming Compact.